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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 259

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM AND MOTION FOR DAMAGES.

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SUPREME COURT OF LOUISIANA

No. 38,833

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.,
Appellees

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

MOTION OF APPELLEES TO DISMISS OR AFFIRM AND STATEMENT OF GROUNDS MAKING AGAINST JURISDICTION AND MOTION OF APPELLEES FOR DAMAGES UPON DISMISSAL OR AFFIRMANCE.

Come now the Appellees, City of New Orleans; Chicago, St. Louis and New Orleans Railroad Company; Gulf, Mobile & Ohio Railroad Company; Illinois Central Railroad Company; Louisiana & Arkansas Railway Company; Louisville and Nashville Railroad Company; Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor; New Orleans and Northeastern Railroad Company; New Orleans Terminal Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; and Texas

Pacific-Missouri Pacific Terminal Railroad of New Orleans, through their respective undersigned counsel, and file herewith their motion to dismiss or, in the alternative, to affirm, the appeal, and their statement of the grounds making against the jurisdiction of the Supreme Court of the United States of this cause, pursuant to the provisions of Rules 7 and 12 of said Court, and their motion for damages for delay upon dismissal or affirmance, pursuant to the provisions of U. S. C. Title 28, Section 878.

A

Motion to Dismiss or Affirm

Appellees move the Supreme Court of the United States to dismiss the appeal taken herein to said Court by appellants, Theophile O. Hotard and Allen H. Johness, on the ground that they have failed to comply with the rules of said Court with reference to the taking of appeals to it in that: (a) They have not filed any Jurisdictional Statement and have not within five days from the allowance of their appeal served on movers copy of such Jurisdictional Statement or of a statement directing attention to the provisions of paragraph 3 of Rule 12 of the Rules of the said Court, and (b) When the appeal was allowed, no citation to the appellees was signed by the Justice allowing the appeal, as required by paragraph 1 of Rule 10.

Appellees moreover move the Supreme Court of the United States to dismiss or, in the alternative, to affirm with costs, the appeal taken herein to the said Court by appellants, Theophile O. Hotard and Allen H. Johness, on the grounds that the record affirmatively shows no proper presentation of any Federal question of such character as would sustain jurisdiction on appeal and particularly that

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the record affirmatively shows that this case involves no substantial Federal question.

Appellees submit, in support of said motion, the following:

B

Statement of Grounds as to Appellants' Failure to Comply With the Rules of the Supreme Court of the United States in Attempting to Take Their Appeal.

(a) The Absence of Jurisdictional Statement

Rule 12 of the Rules of the Supreme Court of the United States provides in the opening sentence of paragraph 1 thereof that

> "Upon the presentation of a petition for the allowance of an appeal to this court, from any court, to any judge or justice empowered by law to allow it, there shall be presented by the applicant a separate typewritten statement particularly disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment or decree in question."

The balance of said paragraph 1 sets out minutely and in precise detail what the said statement shall contain.

Paragraph 2 of the rule is as follows:

> "If the appeal is allowed, the appellant shall serve upon the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record, and shall be incorpo-

rated by him in the transcript of record prepared for this court upon the appeal."

Paragraph 3 provides for the filing by appellee with the clerk of the court possessed of the record a typewritten statement disclosing any matter or ground making against the jurisdiction of this court in which may be included a motion to dismiss or affirm.

Paragraph 4 makes it mandatory on the clerk of the court possessed of the record to include in the transcript the statements and motions required and permitted to be filed under the provisions of the said rule.

Paragraph 5 provides that after the docketing of the case in this court and the filing of the transcript

> ". . . the clerk of this court shall forthwith print the appellant's statement required by paragraph 1 of this rule and the opposing statement, and motions, if any, permitted by paragraph 3 of this rule, and the clerk shall thereupon distribute such printed papers to the court for its consideration."

Paragraph 6 is as follows:

> "If either appellant or appellee fails to comply with the provisions of this rule, the clerk of this court shall report such failure to the court immediately so that this court may take such action as it deems proper."

It is respectfully submitted that the filing of the Jurisdictional Statement is absolutely sacramental, for that is the sole and only method by which the appellant's contention that this court has jurisdiction of the appeal is presented to this court; and that therefore the failure to file a Jurisdictional Statement requires the dismissal of the appeal because not taken as specifically provided by the Rules.

Under the Rule the Jurisdictional Statement should have

been filed contemporaneously with the presentation of the petition for appeal. That was not done.

Furthermore, paragraph 2 of the Rule requires that among other things to be served on appellees within 5 days after the allowance of the appeal were a copy of the Jurisdictional Statement and a statement directing attention to the provisions of paragraph 3 of the Rule, and that proof of service of such documents be filed forthwith with the Clerk of the Court possessed of the record. None of these requirements was met. Obviously, a copy of the Jurisdictional Statement could not be served, since none has ever been filed.

Absence of these essential matters and things makes it impossible for this Court to consider any jurisdictional contentions which appellants may have in mind.

For these defaults the appeal should be dismissed.

(b) The Failure as to Citation

There was also a failure to comply with the requirement of paragraph 1 of Rule 10 that "When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal." No such citation was signed when the appeal was allowed nor, indeed, since.

This is another omission requiring the dismissal of the appeal.

C

Record Affirmatively Shows No Federal Question of Substantial Character and No Proper Presentation of Any Federal Question.

(a) Essentials of Jurisdictional Showing

We do not rest merely upon the complete failure of appellants to file the Jurisdictional Statement required by Rule

12, paragraph 1, and we now proceed to demonstrate the complete absence of any jurisdictional basis for this appeal and the affirmative showing made by the record that this case involves no Federal question of a substantial character and no proper presentation of any Federal question.

In the absence of a Jurisdictional Statement specifying the statutory provision believed by appellants to sustain the asserted appellate jurisdiction, we assume that this statutory provision is the following portion of U. S. C. Title 28, Section 344:

> ". . . where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity . . ."

In *Rescue Army* v. *Municipal Court*, 331 U. S. 543, the opinion, referring to this statutory provision and Rule 12, paragraph 1, emphasizes (P. 568):

> ". . . the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions."

(b) Analysis of Opinions of Louisiana Supreme Court

As the reported opinion of the Louisiana Supreme Court herein shows (35 So. 2d 752), this suit involves an unsuccessful effort to prevent works of great public improvement in the City of New Orlenas through an attack upon the validity of a contract between the municipality and the railroads for the construction and operation of a Union Station and for numerous grade separations. The making of this contract by the municipality was authorized by a constitutional amendment submitted to the voters of Louisiana through the enactment of Act 385 of 1938, which upon

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the affirmative vote of the electorate in that year became Section 31.3 of Article XIV of the State Constitution.

As appears from the opinion of the Louisiana Supreme Court and the two dissenting opinions, numerous issues of State law were litigated and resolved against the appellants, both in the trial court and on appeal, but no suggestion of any Federal question being regarded as involved and determined in this litigation appears anywhere in these opinions, even in the lengthy and vigorous dissenting opinion of Mr. Justice Fournet.

The issues determined herein by the Louisiana Supreme Court are described in almost identical language in the following passages quoted from the opinion of the Court and from this dissenting opinion:

Opinion of Court	*Dissenting Opinion*
"The argument for the appellants resolves itself into two main divisions: (1) an attack upon the validity of the constitutional amendment, and (2) an attack upon certain provisions of the contract itself" (Page 754).	"The challenges which these parties have levelled at the contract's validity may be divided broadly into an attack on (1) the constitutionality of Act No. 385 of 1938, which authorized the submission of this amendment to the people for ratification, and (2) the legality of the contract itself" (Page 760).

We also direct particular attention to the summary in this dissenting opinion of the grounds upon which appellants assailed the constitutional amendment which authorized this contract and challenged the validity of the contract itself (Pages 760-761). It amply appears from this full statement of the issues resolved against appellants by the Louisiana Supreme Court, over this objection and dissent of Mr.

Justice Fournet, that questions of State law alone were litigated and adjudicated and that no Federal question arose in the case. There was also a dissenting opinion by Mr. Justice Ponder (Pages 759-760), but that dissent likewise suggests no Federal question and deals only with an issue of purely State law—the contention that a provision in the contract as to annual appropriations from the municipal revenues violated a provision in the State Constitution (Section 24 of Article XIV).

To sum up, all the opinions of the Louisiana Supreme Court show that, in determining the validity of the constitutional amendment under which the municipality entered into this contract, the questions dealt with involved compliance, in the procedure of submitting and adopting this constitutional amendment, with the provisions of Section 1 of Article XXI of the Constitution of Louisiana, prescribing the manner for submitting constitutional amendments to a vote of the electorate, as interpreted in *Graham* v. *Jones,* 198 La. 507, 3 So. 2d 761. There is no suggestion in these opinions that any Federal question was involved and adjudicated in the determination of these issues of purely State law.

Likewise these opinions show that, in passing upon the validity of the contract itself, the Louisiana Supreme Court dealt with the extent of contractual power conferred upon the municipality in this field by Section 31.3 of Article XIV of the State Constitution (Act 385 of 1938). Such questions of extent of the authority which State law confers upon a municipality are obviously likewise questions of purely State law.

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(c) Initial Pleading of Plaintiff

The petition by which appellants instituted this suit contains only the vaguest and most illusory references to Federal questions. Article IV of the petition avers:

> "That Act 385 of 1938 does not so provide and is unconstitutional, under the State Constitution, in the manner of its submission and adoption, in its contents and deprives petitioners of their property without due process of law and does not afford them the equal protection of the law under both the State and Federal Constitutions, for the reasons hereinafter alleged."

Article X of the petition reads as follows:

> "That whatever property the City may acquire in adjacent parishes or may construct thereon becomes exempt from every form of taxation whatsoever (Sec. 1, Para. 6), decreasing the security of the bonds of said parishes secured by said property and impairing the obligations of contracts."

However, plaintiffs did not sue as bondholders, nor did they even allege themselves to be bondholders, and they are on the face of the record absolutely without any interest in any Federal question which may be suggested by this averment.

The only other possible mention of a Federal question in the petition is Article XVI, which follows averments that the electors were misinformed and misled at the 1938 election by the language on the ballot referring to the constitutional amendment proposed by Act 385 of 1938. This article of the petition reads as follows:

> "That same did not give said electors sufficient notice to afford them due process of law."

These three extracts from this initial pleading of the plaintiffs constitute all the showing made by the record as

to any effort on their part in this case to raise and to have adjudicated any Federal questions. Apart from the problem of whether there is "reasonable clarity and definiteness" in these averments, it is obvious, from the omission of any mention of these issues anywhere in any of the opinions of the Louisiana Supreme Court, that the questions sought to be raised by these paragraphs of the petition must have impressed that Court as wholly lacking in substance.

(d) Issues of State Constitutional Present no Federal Question

The opinions of the Louisiana Supreme Court show a dealing with only issues of State law—the validity of the adoption of the State constitutional amendment under which this power was exercised by the municipality; the relationship between the substance of this State constitutional amendment and other provisions of the State Constitution; and the conformance of the power exercised by the municipality under this State constitutional amendment with the grant of power and authority contained in that enactment.

Questions of State constitutional law are non-Federal in character, whether they arise in connection with ordinary legislation or State constitutional provisions. Decisions so recognizing as to the latter classification are as follows:

In re Kemmler, 136 U. S. 436, 447.

> "The decision of the state courts sustaining the validity of the act under the state constitution is not reexaminable here . . ."

Ross v. *Oregon*, 227 U. S. 150, 164.

> "The state court ruled that the amendment to the state constitution was prospective and did not affect pending cases. Error is now assigned upon that ruling. But

it involved nothing more than the construction of the constitutional amendment, which was a question of local law, and its decision by the state court is not reviewable here."

Memphis & Charleston Ry. Co. v. *Pace*, 282 U. S. 241, 244.

"The Supreme Court of the State in the decision under review holds that the creation of the road district, the issue of the bonds and the levy of the tax were all valid under the state constitution and the acts before cited; that the board of supervisors in creating the district acted in a legislative capacity, they being invested by the constitution and statutes of the State with discretion to create the district, or refuse to create it, according to their judgment of the best interests of all concerned; and that the two confirmatory acts were valid under the state constitution and operated to make the district a legislatively created district if it was not such before. These were all questions of state law, and their decision by that court is controlling here."

Utley v. *St. Petersburg*, 292 U. S. 106, 110.

". . . What the appellants really claim is this, that the remedy, though adequate on its face, is made inadequate by provisions of the Florida constitution, which are said to condemn it. We do not elaborate the argument, for the conflict, if there is any, between the statute regulating this improvement and the local constitution must be adjudged, not by us, but by the courts of the locality."

For the foregoing reasons, we submit that the appeal should be dismissed, or affirmed with costs.

D

Motion for Damages upon Dismissal or Affirmance

In the event of dismissal or affirmance, appellees move the Supreme Court of the United States for an order award-

ing damages against appellants, under U. S. C. Title 28, Section 878, for delay in taking an appeal to said Court on frivolous and unsubstantial grounds.

E

Appropriate Damages Should Be Awarded Against Appellants

This motion is based on U. S. C. Title 28, Section 878 (formerly R. S. Section 1010), which reads as follows:

> "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

We will now proceed to set forth the authorities which justify the award of damages, on dismissal or affirmance, in cases where the Court is convinced that the appeal is frivolous and taken merely for the purpose of delay.

In *Amory* v. *Amory*, et al, 91 U. S. 356, the Court said:

> "We can adjudge damages under Section 1010, Revised Statutes, and Rule 23 in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time."

In *Gibbs* v. *Diekma*, 131 U. S., Appendix clxxxvi, the Court said:

> "The decree is affirmed, and it is so apparent the appeal was vexatious and for delay only, that we adjudge to the appellees five hundred dollars as just

damages for their delay. While Section 1010 of the Revised Statutes includes in express terms, writs of error only, Section 1012 provides that appeals from the Circuit and District Courts shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in all cases of writs of error. This gives us authority to adjudge damages for delay on appeals as well as writs or error, and our power is not confined to money judgments only."

In *Whitney* v. *Cook*, 131 U. S., Appendix cxcvii, the Syllabus reads:

"Damages are awarded in a case where the appeal was taken for delay and was frivolous."

Not only does the record herein affirmatively show that no Federal question of a substantial character is presented, but, as indicative of the motives which prompted the appellants to take the appeal, we point out that the Supreme Court of Louisiana denied a rehearing on April 26, 1948, and plaintiffs waited until July 24, 1948, before filing the petition for appeal, and then completely failed to comply with the clear and positive requirements of Rule 12, paragraph 1.

In *Deming* v. *Carlisle Packing Company*, 226 U. S. 102, the Syllabus reads in part as follows:

"Even though the record may present in form a Federal question, the writ of error will be dismissed if it plainly appear that the Federal question is so unsubstantial and devoid of merit as to be frivolous.

• • • • • • •

"The unsubstantial and frivolous character of the only Federal question presented in this case embraces the conclusion that the writ was prosecuted for delay.

• • • • • • •

"Under Rule 23, which is based on Section 1010, Revised Statutes, this Court has the same power to award damages for delay where the writ or error is dismissed as where there is judgment of affirmance; and in this case five per cent damages are imposed in addition to costs."

We also quote from *Slaker, Administrator,* v. *O'Connor,* 278 U. S. 188, 190, where the Court said:

"The above provisions were considered in Deming *v.* Carlisle Packing Co., 226 U. S. 102, 106, and Wagner Electric Co. *v.* Lyndon, 262 U. S. 226, 233. Together those cases determine that where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed. In the first cited case—writ of error to state court—penalty of five per centum was imposed upon the plaintiff in error; in the second—an appeal from federal court—the appellant was subjected to penalty of fifteen hundred dollars and required to pay the costs. See also Gibbs *v.* Diekma, 131 U. S. Appendix clxxxvi.

"Here, without any authority of law, the appellant obtained an appeal. Thereby he has needlessly consumed our time and imposed serious delay upon the appellees and otherwise burdened them."

We also refer to the contemporaneous decision in *Roe* v. *Kansas, ex rel, Smith, Attorney General,* 278 U. S. 191, wherein the Court awarded damages for a frivolous appeal in a condemnation case.

In *Wagner Electric Manufacturing Company* v. *Lyndon,* 262 U. S. 226, the Court dismissed an appeal from the Circuit Court of Appeals. On appellee's Motion for Damages, the Court said (Page 233):

"An objection to allowing damages in the present case suggesting itself is that the decree appealed from

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was not a money judgment. It is true that this whole litigation in the federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the twenty-third rule. Sections 1010 and 1012, Revised Statutes, are, however, not so restrictive, and they give this court power to impose just damages upon the affirmance of any judgment or decree, for delay. Gibbs *v.* Diekma, 131 U. S., Appendix clxxxvi.

"The case should be dismissed for lack of jurisdiction, because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed, just as if upon an affirmance. Deming *v.* Carlisle Packing Co., 226 U. S. 102, 109. (33 Sup. Ct. 80, 57 L. Ed. 140.)

"We think that damages of $1,500 for delay are not excessive in this case. We therefore direct the dismissal of the appeal, with damages of $1,500 and the taxation of costs as upon an affirmance of the decree of the District Court."

In *Deming* v. *Carlisle Packing Company*, 226 U. S. 102, cited above, the Court held specifically that the power to award damages for a frivolous appeal extends to cases where the appeal is dismissed, just the same as if the decision of the lower court had been affirmed on appeal. Said the Court (Page 110):

"Because of the absolute coincidence between a dismissal on account of the frivolous and unsubstantial character of the Federal question relied upon and an affirmance upon the same ground, we are of opinion that the statutory authority to impose the penalty obtains in either case."

In the present case, the record shows an attempt by appellants to delay and prevent works of great public improvement in the City of New Orleans. The decisions be-

low were all in favor of appellees. We submit that the record itself is the best proof that this appeal was taken merely for delay. We therefore respectfully ask that, upon dismissal or affirmance, an award of substantial damages be made against appellants.

August 9, 1948.

Respectfully submitted,

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